DONGGUAN ELOP METAL PRODUCT COMPANY LTD

v.

ROKONMA (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AMELIA TEE ABDULLAH J
[SUIT NO: 22NCVC-1058-10/2011]
6 APRIL 2012

CIVIL PROCEDURE: *Affidavits - Affidavit of service - Whether there were deficiencies - Failure to indorse necessary particulars in affidavit of service - Whether there was non-compliance of O. 10 r. 1(4) Rules of the High Court 1980 - Whether defect curable under O. 1A Rules of the High Court 1980*

CIVIL PROCEDURE: *Judgments and orders - Judgment in default - Setting aside - Writ and statement of claim - Whether served properly on defendant - Failure to indorse necessary particulars in affidavit of service - Whether there was non-compliance of O. 10 r. 1(4) Rules of the High Court 1980 - Whether defect curable under O. 1A Rules of the High Court 1980 - Whether judgment in default an irregular judgment and should be set aside ex debito justitiae*

The plaintiff claimed against the defendant for a sum of USD394,584.04 (RM1,238,993.80), interests and costs in respect of goods which had been sold and delivered to the defendant. The writ of summons and statement of claim were duly served on the defendant on 1 November 2011. Appearance not having been entered by the defendant, a Perakuan Ketidakhadiran was issued by the Senior Assistant Registrar on 11 November 2011 and judgment in default of appearance was entered on 16 November 2011. *Vide* a summons in chambers (encl. 8) the defendant applied under O. 42 r. 13 and/or O. 92 r. 4 of the Rules of the High Court 1980 ("RHC") to set aside the judgment in default. The reasons for the application were that: (i) the defendant had not received the writ and statement of claim; and (ii) the judgment in default was irregular.

Held (allowing defendant's application in encl. 8; setting aside judgment in default with costs in cause):

(1) The writ and statement of claim had been served on the defendant at the latter's business address. An acknowledgment chop of the defendant and a signature appeared on the accompanying letter of the plaintiff's solicitors signifying receipt of the documents by the defendant. The defendant claimed that the official stamp affixed on the said letter appeared to be different from the receipt stamps that were placed on letters received by the defendant. However, the plaintiff was able to show that the defendant's acknowledgment receipt stamps was the same as the defendant's rubber stamp on the plaintiff's solicitor letters' letter attaching the judgment in default (which the defendant admitted receiving). In light of the evidence that there existed more than one type of rubber stamp which was used by the defendant, the defendant's complaint in this regard was without basis. (para 20)

(2) According to the defendant, the plaintiff's process server had failed to disclose in the affidavit of service the name and designation of the person on whom the writ and statement of claim was served, who had acknowledged receipt of the documents and the time of the alleged service. This was a case of non-compliance with O. 10 r. 1(4) of the Rules of the High Court 1980 where the process server had failed to indorse particulars clearly provided as necessary to be indorsed. This deficiency in the indorsement of the process server was not a defect which was curable under O. 1A of the RHC 1980. Since the consequences of such non-compliance was so serious, non-compliance with this rule could not be said to be only of a technical nature. In light of the clear deficiencies in the affidavit of service filed by the process server, the judgment in default was not considered a regular judgment. That being so, the default judgment ought to be set aside *ex debito justitiae*. (para 22)

Case(s) referred to:

Eastern China United SEA Sdn Bhd v. Ark Venture Holdings Sdn Bhd [2009] 7 CLJ 299 HC ***(refd)***

MIDF Amanah Ventures Sdn Bhd v. Bostonweb Academy Sdn Bhd & Ors [2011] 5 CLJ 778 HC ***(dist)***

Wong Yok Moi v. Yong You Min [2001] 7 CLJ 296 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 3
Rules of the High Court 1980, O. 1A, O. 2 r. 1(1), O. 10 r. 1(4), O. 42 r. 13, O. 62 r. 4(1)(b), O. 92 r. 4

For the plaintiff - Akberdin Abd Kadir (Faradinah Abu Bakar with him); M/s Akberdin & Co
For the defendant - Gabriel Daniel; M/s Paul Ong & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Amelia Tee Abdullah J:

[1] The plaintiff, Dongguan Elop Metal Product Company Limited's claim against the defendant, Rokonma (M) Sdn Bhd, is for a sum of USD394,584.04 (which is equivalent to RM1,238,993.80), interests and costs in respect of goods which had been sold and delivered to the defendant.

[2] The writ of summons and statement of claim were duly served on the defendant on 1 November 2011. Appearance not having been entered by the defendant, a Perakuan Ketidakhadiran was issued by the Senior Assistant Registrar on 11 November 2011 and judgment in default of appearance was entered on 16 November 2011.

[3] *Vide* a summons in chambers (encl. 8), the defendant now applies under O. 42 r. 13 and/or O. 92 r. 4 of the Rules of the High Court 1980 ("RHC") to set aside the judgment in default and to be allowed to file its defence within 14 days. Briefly, the reasons for the application are that the defendant had not received the writ and statement of claim, that the judgment in default was irregular and alternatively, that the defendant had a defence on the merits.

Chong Kak Fang's Affidavit in Support – Encl. 9

[4] In his Affidavit in Support (encl. 10) filed on 29 December 2012, Chong Kak Fang, the director of sales of the defendant, states that the defendant had never received the writ of summons and statement of claim from the plaintiff's solicitors and had no knowledge of the proceedings that had been commenced. It was only on 14 December 2011 when his office received a letter from

A Messrs Akberdin & Co attaching a copy of the judgment in default that the defendant first knew of the suit that had been filed.

[5] Upon his solicitors making a search at the court, it was B found that according to the affidavit of service of one Muhammad Syauqi bin Ridwan affirmed on 8 November 2011, the writ and statement of claim were allegedly served on the defendant at No. 2-5, Jalan Bukit Badak, Subang New Village, 40000 Shah Alam, Selangor on 1 November 2011.

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[6] According to Chong Kak Fang, he had made enquiries from all employees who were working on 1 November 2011 but no one could identify the signature acknowledging receipt on the plaintiff's solicitors' letter. He claimed that the official stamp that was affixed on the said letter (p. 18 of CF3) appeared to be different from D the receipt stamp that was placed on letters that were received by the defendant (see p. 1 of CF1).

[7] Chong further contends that the affidavit of service of the plaintiff's process server had failed to state the name or designation E of the person to whom the writ and statement of claim were served as required under the Rules of the High Court 1980. The affidavit of service had also failed to state the time the said service was effected. As such, he contends that the indorsement on the back of the writ was defective in light of the absence of these F material particulars.

[8] Chong further avers that the perakuan ketidakhadiran was premature. Since the defendant was served at its business address in Shah Alam which address was beyond the limits of the local G jurisdiction of the Kuala Lumpur High Court, the time for entering appearance should have been 12 days and not 8 days. And since the defendant was alleged to have been served on 1 November 2011, the time for entering appearance ended on 12 November 2011. And since 12 November 2011 falls on a Saturday, the time H for entering appearance should be 14 November 2011. He thus contends that the perakuan ketidakhadiran was prematurely issued by the Senior Assistant Registrar on 11 November 2011 and as such, the judgment in default entered into was irregular and should be set aside *ex debito justitiae*.

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[9] Lastly, Chong Kak Fang contends that the defendant has a defence on the merits. He claims that all the defendant's transactions with the plaintiff were made in Chinese Renminbi whereas the plaintiff's claim was made in US Dollars. The defendant, in disputing the plaintiff's claim of USD 394,584.04, states that it had paid the plaintiff for all goods delivered that met all specifications. The outstanding invoices which form the subject matter of the plaintiff's claim were in respect of goods that were defective or which failed to meet the specifications that were set out in its purchase orders.

[10] Chong Kak Fang had also made reference in his affidavit to defective goods ordered before 2008. Unfortunately, various documents allegedly evidencing set-off and overpayment on the part of the defendant were either not translated or unclear and the court is unable to come to any positive findings on this issue.

Soon Kok Yin's Affidavit In Reply – Encl. 10

[11] The plaintiff's affidavit in reply was affirmed by Soon Kok Yin, a director of the plaintiff. In re-affirming that the defendant was indeed served at its business address, he had pointed out that the defendant's acknowledgement receipt stamp on the plaintiff's letter in exh. CKF3 is the same as the defendant's rubber stamp on the plaintiff's solicitors' letter dated 13 December 2011 attaching the judgment in default. This was also sent to the defendant's business address (see exh. SKY1) and there is no suggestion that the defendant had not received the letter attaching the judgment in default. As such, Soon Kok Yin states that the defendant was only finding excuses for failing to take timely action to enter appearance in this case.

[12] In relation to the defendant's contention that the perakuan ketidakhadiran was premature, Soon states that exh. CKF4 was only a draft and not a sealed copy of the perakuan. As the judgment in default was dated 16 November 2011, he contends that the judgment in default was regularly obtained and should not be set aside.

[13] As regards the defendant's contention that they had a defence on the merits, Soon Kok Yin avers that the plaintiff's business transactions with the defendant were in both Chinese

Renmimbi as well as US Dollars. In respect of the purchase orders which form the subject matter of the present case, the transactions were in US Dollars as can be clearly be seen in the purchase orders in exh. SKY3 which were all in US Dollars.

[14] Soon Kok Yin contends that the issue of the defendant having a counterclaim against the plaintiff is but an afterthought as the defendant had failed to show any evidence that there were complaints of defective goods or any report of rejection of defective goods. He points out that exh. CKF6 is irrelevant as it pertains not to the goods in the invoices which forms the subject matter of the plaintiff's claim but were in relation to the rejection of goods that were invoiced much earlier in 2006 and 2007.

[15] After February 2008, the plaintiff has stopped delivery of goods to the defendant as the latter had failed to pay the outstanding sum of USD 394,484.04. The invoices which form the basis of the plaintiff's claim are for goods which had already been supplied and NOT for goods for which the delivery was stopped.

[16] As such, the plaintiff contends that the defendant has no defence on the merits and had failed to show any special circumstances to warrant a stay of proceedings.

Chong Kak Fang's Affidavit In Reply – Encl. 12

[17] Chong Kak Fang has filed a final affidavit in reply in which he reiterates that there was no service on the defendant, that the perakuan ketidakhadiran was premature and that the defendant had a defence on the merits. Chong again relies on exh. CKF6 as evidencing the defendant's counterclaim. Unfortunately, the photographs exhibited in these documents are unclear and most of the contents are in the Chinese language and with no translation.

Decision

[18] In coming to a decision as regards the defendant's application to set aside the judgment in default entered against it on 16 November 2011, the court has carefully considered the affidavits filed in this case, the documentary exhibits as well as the written submissions and authorities prepared by both counsels.

[19] The first issue is whether the writ and statement of claim had been properly served on the defendant. Upon a careful perusal of the documents, the court finds that the writ and statement of claim would appear to have been served on the

defendant at the latter's business address at No. 2-5, Jalan Bukit Badak, Subang New Village, 40000 Shah Alam, Selangor on 1 November 2011. An acknowledgement chop of the defendant and a signature appears on the accompanying letter of the plaintiff's solicitors signifying receipt of the documents by the defendant.

[20] The court has given due consideration to the defendant's claim that the official stamp affixed on the said letter at p. 18 of CF3 appears to be different from the receipt stamps that were placed on letters received by the defendant. In support of this argument, the defendant has drawn the court's attention to a receipt stamp at p. 1 of CF1. This argument may well have raised some doubts except for the fact that the plaintiff was able to show that the defendant's acknowledgement receipt stamp on exh. CKF3 is the same as the defendant's rubber stamp on the plaintiff's solicitors' letter dated 13 December 2011 attaching the judgment in default (which the defendant admits receiving). In light of the evidence that there exists more than one type of rubber stamp which is used by the defendant, the court finds the defendant's complaint in this regard to be without basis.

[21] The case of *Eastern China United SEA Sdn Bhd v. Ark Venture Holdings Sdn Bhd* [2009] 7 CLJ 299 cited by learned counsel for the plaintiff is relevant to our instant case. In that case, the defendant had succeeded in setting aside the judgment in default of appearance obtained on the grounds that the judgment was irregularly obtained as the writ and the statement of claim were served on the defendant at an address which had ceased to be the principal place of business of the defendant. In allowing the appeal of the plaintiff, His Lordship Hishamudin Mohd Yunus J held that the writ of summons and the statement of claim were served on a staff of the defendant at a premise known as Suite 9-3, Level 9, Wisma UOA II, Jalan Pinang, 50450 Kuala Lumpur. According to the affidavit of service of the plaintiff, the said staff of the defendant had acknowledged receipt of the writ and statement of claim by affixing the defendant company's chops and writing at the back of the writ of summons. On the authority of O. 62 r. 4(1)(b) of the RHCourt 1980, this mode of service ie, service on a staff of the company at the principal place of business/ principal office of the defendant was valid.

[22] The defendant has also raised an issue that the plaintiff's afidavit penyampaian or affidavit of service is defective. According to the defendant, the plaintiff's process server had failed to disclose in the affidavit of service the name and designation of the person on whom the writ and statement of claim was served and who had acknowledged receipt of the documents. The defendant had also complained that the time of the alleged service was not stated in the affidavit of service. Reference was made by the defendant to O. 10 r. 1(4) of the RHC 1980 which states that unless the person serving the writ endorses on it the day of the week and the date that it was served, the person on whom it was served and, where he is not the defendant, the capacity in which that person was served, the plaintiff shall not be entitled to enter judgment in default of appearance or judgment in default of defence unless the court so orders.

[23] In this case, the defendant is a company. A proper scrutiny of the indorsement of the process server will disclose the following:

i. The name and designation of the person on whom it was served was not disclosed;

ii. The time of the alleged service was not disclosed; and

iii. The endorsement itself was undated.

[24] Learned counsel for the plaintiff has referred the court to the case of *MIDF Amanah Ventures Sdn Bhd v. Bostonweb Academy Sdn Bhd & Ors* [2011] 5 CLJ 778 in support of his argument that the deficiencies in the indorsement should not render the affidavit of service to be defective. In the case of *MIDF Amanah Ventures (supra)*, the complaint was that the indorsement of service was written on the reverse of the last page of the writ of summons and not on p. 5 of the writ of summons. In that case, the court was of the view that failure to comply strictly with the forms should not render a document defective so long as there is substantial compliance with the forms. The court held that the form of indorsement as per the format at p. 5 of the writ of summons was for the convenience of the process server, but should he decide not to avail himself on the use of the form, that should not render his indorsement defective.

[25] However, the court is of the view that the situation is quite different in our instant case. Here, it is not a question of the process server not using the format of the form but a case of non-compliance with O. 10 r. 1(4) where the process server has failed to indorse particulars clearly provided as necessary to be indorsed, namely the name of the person who accepted service and the capacity in which that person was served. The indorsement was also not dated. The issue that arises is whether these deficiencies are curable under O. 1A and O. 2 r. 1(1) of the RHC 1980.

[26] After much thought, the court is of the considered view that this deficiency in the indorsement of the process server is not a defect which is curable under O. 1A of the RHC 1980. The court took this view in light of the specific provisions in O. 10 r. 1(4) to the effect that should the specific particulars required to be indorsed by the process server be not so indorsed, then the plaintiff "shall not be entitled to enter final or interlocutory judgment against that defendant in default of appearance or in default of defence". The court finds that since the consequences of such non-compliance is so serious, non-compliance with this rule cannot be said to be only of a technical nature.

[27] In light of the clear deficiencies in the affidavit of service filed by the process server, Muhammad Syauqi bin Ridwan, the court is of the considered view that the judgment in default was not a regular judgment. That being so, the default judgment ought to be set aside *ex debito justitiae*. There is thus no need for the court to consider the issue of whether the defendant has a defence on the merits which would only be considered if the judgement was a regular judgment.

[28] A point of interest as regards the defendant's claim that the perakuan ketidakhadiran was premature. In his affidavit in support (encl. 9), Chong has suggested that the defendant's business address in Shah Alam is beyond the limits of the local jurisdiction of the Kuala Lumpur High Court and as such the time for entering appearance should have been 12 days and not eight days. In the case of *Wong Yok Moi v. Yong You Min* [2001] 7 CLJ 296, His Lordship Abdul Malik Ishak J had cause to deal with the issue of the local jurisdiction of the Kuala Lumpur High Court. It was held that under s. 3 of the Courts of Judicature Act 1964, the

A phrase "local jurisdiction" of the High Court in Malaya would include Selangor as well as the Federal Territory. In that case, it was held that there was no difference whether the defendant's place of employment and his residence were within Selangor or within the Federal Territory as the time limited for appearing B would be the same, namely eight days.

[29] Since the defendant was allegedly served on 1 November 2011, the time for entering appearance would be 9 November 2011. It follows there from that the perakuan ketidakhadiran C issued by the Senior Assistant Registrar on 11 November 2011 was not premature. In any event, the court finds this issue as to whether the perakuan was premature or otherwise to be not in issue since the court has found that the judgment in default was irregular.

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[30] Accordingly, the court herewith allows the defendant's application in encl. 8 to set aside the judgment in default entered into on 16 November 2011. The defendant is to file its defence within 14 days from today and the court will fix a date for further case management. The costs of this application shall be costs in E the cause.

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